No. 95-1298

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN RE: INFOTECHNOLOGY, INC.,
A DELAWARE CORPORATION,

Debtor.

JOHN S. ABELES; EARLW. BRIAN; DWIGHT W. GEDULDIG;
JOHN E. CAINCA; WALLACE O. SELLERS;
PAUL STEINLE; AND JOHN BERENTSON,

Petitioners,

v.

INFOTECHNOLOGY, INC.,

Debtor-Respondent,

PENSION BENEFIT GUARANTY CORPORATION
AND AVACUS PARTNERS, L.P.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

ROBERT D. LUSKIN *
JOSEPH G. DAVIS
COMEY BOYD & LUSKIN
2828 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20007-3763
(202) 625-1200

Attorneys for Respondent Avacus Partners, L.P.

**Counsel of Record*

PRESS OF BYRON S. ADAMS WASHINGTON, D.C. 1-800-347-8208

QUESTIONS PRESENTED

1. Did the Bankruptcy Court, which considered and rejected Petitioner-Creditor's objections to the Plan of Reorganization ("Plan") after notice, written submissions and a hearing, commit reversible error by approving, without notice to Petitioner-Creditors, a preliminary settlement between Debtor and another creditor that was expressly conditioned on confirmation of and incorporation into the Plan, despite the Second Circuit's undisputed conclusion that the Bankruptcy Court could not have rejected the settlement without abusing its discretion?

2. Does *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968), require reversal of the Bankruptcy Court's decision, after carefully examining all relevant facts at hand, to confirm the Plan, which included the compromise of a dispute between Debtor and the Pension Benefit Guaranty Corporation ("PBGC") concerning Debtor's liability for the pension plan of a 99%-owned subsidiary, merely because a plan termination date had not been chosen prior to confirmation of the Plan and despite undisputed proof -- the subsequent choice of a termination date -- that PBGC's claim against Debtor was legitimate?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-1298

IN RE: INFOTECHNOLOGY, INC.,
A Delaware Corporation
Debtor.

JOHN S. ABELES; EARL W. BRIAN;
DWIGHT W. GEDULDIG; JOHN E. KOONCE;
WALLACE O. SELLERS; PAUL STEINLE;
and JOHN BERENTSON,
Petitioners,

v.

INFOTECHNOLOGY, INC.,
Debtor-Respondent,

PENSION BENEFIT GUARANTY CORPORATION
and AVACUS PARTNERS, L.P.,
Respondents.

BRIEF IN OPPOSITION

Respondent Avacus Partners, L.P. ("Avacus") respectfully requests that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed by Petitioners John S. Abeles, Earl

W. Brian, Dwight W. Geduldig, John E. Koonce, Wallace O. Sellers, Paul Steinle and John Berentson.

I. STATEMENT

On November 9, 1995, Chief Judge Jon O. Newman entered a Summary Order on behalf of a unanimous panel of the Second Circuit affirming the March 7, 1995 judgment of the District Court, which in turn had affirmed the June 23, 1994 order of the Bankruptcy Court confirming the Chapter 11 reorganization plan of Debtor Infotechnology, Inc. ("Infotech" or "Debtor"). All three lower courts squarely and unanimously rejected the very same arguments that Petitioners ask this Court to entertain.

A. The Avacus Action

Petitioners are former members of the Board of Directors of Infotech and defendants or potential defendants (Steinle and Berentson) in a derivative action pending in the Delaware Chancery Court captioned *Avacus Partners, L.P. v. Brian,* Civil Action No. 11001 (the "Avacus Action"). Pet. at 4-5; Jt. App. at 718-63.[1] The Avacus Action alleges that Infotech's former directors, through two transactions, exchanged stock in Infotech valued at more than $21 million for stock and securities worth at most $300,000 in entities the directors themselves controlled. *Id.* Infotech appointed a special committee to review the derivative claims, which

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[1] Citations to the Petition for Writ of Certiorari will be made to "Pet." Citations to the Joint Appendix submitted by the parties to the Second Circuit will be made to "Jt. App."

recommended that the claims not be pursued by Infotech. Pet. at 5. However, in 1990, Chancellor Allen denied defendants' motion to dismiss the Avacus Action, finding that the provable allegations demonstrated that the consideration that Infotech received in the two transactions was "so inadequate that no person of ordinary, sound business judgment would deem it worth that which the corporation paid." *Avacus Partners, L.P. v. Brian*, Civil Action No. 1101, slip op. at 15 (Del. Ch. Oct. 24, 1990).

B. The Bankruptcies of Infotech and UPI

On March 5, 1991, Infotech filed for protection from creditors under Chapter 11 of the Bankruptcy Code. Pet. at 3. Shortly thereafter, the Avacus Action was stayed. *Id.* at 5. Avacus filed a proof of claim for approximately $25 million in the Infotech bankruptcy, asserting the claims it was prosecuting in the Avacus Action. Jt. App. at 377-78.

At the time of its bankruptcy, Infotech was the parent of United Press International, Inc. ("UPI"). On August 28, 1991, UPI also filed for protection from creditors under Chapter 11 of the Bankruptcy Code. It is undisputed that at various times during and prior to the UPI bankruptcy Infotech owned or controlled virtually all of UPI's voting stock. In particular, on June 27, 1992, Infotech controlled 99% of UPI's voting stock. Pet. at 5a. On October 14, 1994, PBGC and UPI entered into an agreement that terminated UPI's pension plan and established June 27, 1992 as the plan termination date. Jt. App. at 970-74.

C. PBGC's Claims

In 1991 and 1992, the Pension Benefit Guaranty Corporation ("PBGC") filed ERISA claims against Infotech amounting to more than $10 million for minimum funding contributions and unpaid benefit liabilities owing to UPI's pension plan. Jt. App. at 156-58. PBGC alleged that Infotech was liable for UPI's deficiencies under 29 U.S.C. § 1362(a), which imposes liability, in certain circumstances, on an entity that is, "on the termination date" of the pension plan, a member of the "controlled group" of the plan's sponsor. Jt. App. at 156-62. ERISA provides that "controlled group" means all entities "under common control," and further that "common control" has the same meaning as that given by regulations prescribed by the Secretary of the Treasury under subsections (b) and (c) of section 414 of Title 26. 29 U.S.C. § 1301(a)(14). Those Treasury regulations in part provide that two entities are under "common control" if one has an ownership interest of 80% or greater in the other. Treas. Reg. 1.414(c)-2(b)(2).

D. The Bankruptcy Proceedings

On May 26, 1992, Infotech filed its first disclosure statement and proposed plan of reorganization. PBGC and Avacus both objected to the disclosure statement. As a result, the Bankruptcy Court did not approve it.

On February 3, 1993, Infotech filed a second disclosure statement and proposed plan of reorganization. Once again, Avacus and PBGC objected, and once again, the Bankruptcy Court denied approval.

In the Spring of 1993, the Bankruptcy Court urged Infotech, Avacus and PBGC to settle their disputes. After protracted negotiations, and with the help of the Bankruptcy Court, the parties finally reached agreements in principle to resolve their differences. Both agreements were contingent on approval of the Third Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Infotechnology, Inc. and Its Affiliated Debtor, Questech Capital Corporation (the "Plan" or "Reorganization Plan") by the Bankruptcy Court. Petitioners did not participate in these negotiations and concede that they did not have a right to participate in them. Jt. App. at 1187.

The agreement between Infotech and PBGC was reached in May, 1993. The terms of their agreement were set out in a document captioned the "PBGC Term Sheet." Jt. App. at 389-96. Under the PBGC Term Sheet, PBGC will receive certain notes with a face value of $1.5 million, preferred shares in the Debtor as reorganized and warrants. *Id.*

Avacus and Infotech reached an agreement in principal to settle their dispute in August, 1993. However, as a result of the history of hostility between Avacus and Infotech, the parties had considerable difficulty reducing the terms of their agreement to writing. The parties' drafting disputes ultimately were resolved by an agreement on the terms of their settlement (the "Avacus Stipulation") that was "so-ordered" by the Bankruptcy Court on November 22, 1993. Jt. App. at 377-87. Like the PBGC Term Sheet, the Avacus Stipulation was contingent on approval by the Bankruptcy Court of the Reorganization Plan. *Id.* at 384, ¶ 19. The Avacus Stipulation provided generally that the $25 million claim against Infotech's estate would be resolved,

that Avacus would bear the costs of the Avacus Action and that in return Avacus would receive from any recovery it obtained its legal expenses plus 50% of the remaining recovery. *Id.* at 377-87. Petitioners did not receive notice of the Avacus Stipulation before it was "so-ordered" by the bankruptcy Court. Pet. at 6.

The PBGC Term Sheet and the Avacus Stipulation were incorporated into drafts of the Reorganization Plan and disclosure statement dated on or about January 31, 1994. *See* Jt. App. at 1238; 99-594. Thereafter, notice was sent to Petitioners and all interested parties of a hearing that was held on March 10, 1994, to consider the adequacy of the disclosure statement. Petitioners chose not to file any objections to the disclosure statement, not to participate in the March 10 hearing and not to vote on the Plan. *See* Jt. App. at 595. The Bankruptcy Court later approved the Debtors' Joint Disclosure Statement to Debtors' Third Joint Plan of Reorganization Pursuant to § 1125 of the Bankruptcy Code and the Reorganization Plan.

The Bankruptcy Court then set a confirmation hearing for June 21, 1994, to consider confirmation of the Plan. Copies of the Plan and its exhibits, including the Avacus Stipulation and the PBGC Term Sheet, were transmitted to Petitioners and all interested parties approximately fifty days prior to the June 21 confirmation hearing. Petitioners filed written objections to the Plan and to the terms of the Avacus Stipulation and the PBGC Term Sheet and participated in the confirmation hearing. The Bankruptcy Court addressed and overruled each of Petitioners' objections and confirmed the Plan in an order filed June 23, 1994 (the "Confirmation Order"). Pet. at 8a-47a. However, the Reorganization Plan does not take effect -- and therefore the Avacus Action

remains stayed -- until all appeals from the Confirmation Order are exhausted. *See* Jt. App. at 8-9.

E. District Court and Second Circuit Proceedings

Petitioners appealed from the Confirmation Order to the United States District Court for the Southern District of New York. Among other things, Petitioners alleged that they were denied due process because the Bankruptcy Court violated Rule 9019(a) of the Federal Rules of Bankruptcy by failing to notify Petitioners of the Avacus Stipulation before it was "so-ordered" by the Court.[2] The District Court disagreed, finding that the Avacus Stipulation was a preliminary settlement, "contingent on the occurrence of a confirmed plan," Jt. App. at 1241, and that Petitioners received adequate notice and opportunity to object to the terms of the Avacus Stipulation through the Confirmation Hearing and attendant proceedings. *Id.* at 1239-42. The District Court further found that even if the District Court had violated Rule 9019 by "so-ordering" the Avacus Stipulation without notice to Petitioners, such error was

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[2] Rule 9019(a) states:

> On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other persons as the court may designate, the court may approve a compromise or settlement.

Fed. R. Bankr. P. 9019(a). Bankruptcy Rule 2002(a) provides that the requisite amount of notice is twenty days. Fed. R. Bankr. P. 2002(a).

harmless, because rejection of the Avacus Stipulation by the Bankruptcy Court would have been an abuse of discretion. *Id.* at 1243.

Petitioners also challenged approval of the Plan based on the terms of the PBGC Term Sheet. Petitioners argued, as they do here, that "[t]he failure of the PBGC to terminate the UPI pension plan as of the date of the confirmation hearing made it impossible for the Bankruptcy Court to properly evaluate the PBGC's contention that Infotech was in UPI's 'controlled group.'" Pet. at 15. According to Petitioners, this fact prohibited the Bankruptcy Court from making the "informed and independent judgment" about the Plan that is required by *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) ("*TMT Trailer Ferry*"). *Id.* The District Court likewise dismissed this objection, ruling that "on any scope of review, even *de novo*, [that] argument is a dead loser" for Petitioners. Jt. App. at 1246.

The Second Circuit unanimously and summarily affirmed the District Court's rulings. Writing for the panel, Chief Judge Newman found that the Bankruptcy Court did not violate Rule 9019 in "so-ordering" the Avacus Stipulation, because it "was a preliminary order" and "was expressly conditioned upon confirmation of the [P]lan by final order of the Court." Pet. at 3a. The Second Circuit also agreed that even if "so-ordering" the stipulation was error, it was harmless:

> As a result of the settlement, the Debtor resolved a claim against the Estate and was absolved of all expenses relating to a lawsuit that it found not worthy of pursuing, yet was guaranteed fifty percent of the recovery if the lawsuit succeeded. To reject such a

favorable settlement would have been an abuse of discretion on the part of the Bankruptcy Court.

Id.

Finally, the Second Circuit rejected Petitioners' claims relating to the PBGC Term Sheet. Judge Newman found that the Bankruptcy Court did not need to know the UPI pension plan termination date in order to approve the Reorganization Plan. Pet. at 5a. He reasoned that Infotech had "no legal role in selecting the [UPI pension] plan termination date" and thus it was reasonable for Infotech and the Bankruptcy Court to conclude "that the termination date selected would likely be a date during which time Infotech was liable for the Pension Plan." *Id.* at 4a-5a. Therefore, "[t]he Bankruptcy Court did not abuse its discretion in approving the compromise, based on its decision that Infotech's assessment of the risk of liability was reasonable." *Id.* at 5a.

II. REASONS FOR DENYING THE PETITION

The petition is frivolous. Petitioners challenge parts of the process by which the Bankruptcy Court confirmed the Reorganization Plan, but the alleged procedural defects are insufficient to alter the ruling that they ask this Court to reverse. Petitioners seek review of the Bankruptcy Court's decision to "so-order" a preliminary settlement between Avacus and Infotech that the District Court and Second Circuit held to be at worst harmless error, yet they do not challenge the rulings on harmlessness. Likewise, Petitioners complain that the Bankruptcy Court did not wait for the UPI pension plan to be terminated before approving the settlement between Infotech and PBGC. Yet Infotech's assumption that a date would be set at a point in time when Infotech was liable for the UPI plan, which the Bankruptcy accepted as a reasonable business judgment, turned out to be

correct. Quite simply, Petitioners seek review of Bankruptcy Court actions that have been mooted either by subsequent rulings that they do not dispute or by factual developments that they cannot dispute.

Petitioners' challenges lack interest even as procedural footnotes. A Bankruptcy Court violates no rule of law by arbitrating disputes between debtor and creditor; on the contrary, arbitration of those disputes is an integral part of the Bankruptcy Court's role. By "so-ordering" the Avacus Stipulation, the Bankruptcy Court facilitated a deal that permitted Infotech to draft an acceptable Reorganization Plan, into which the Avacus Stipulation was incorporated. The settlement embodied by the Avacus Stipulation and the Plan itself were subject to final approval only after Petitioners were afforded concededly ample due process. Thus, no claim was compromised before Petitioners had their day in court.

There is even less reason to second-guess the Bankruptcy Court's judgment that the PBGC Term Sheet was a reasonable compromise of PBGC's claim against Infotech for deficiencies owed under the UPI pension plan. Petitioners provide no support for their radical contention that a Bankruptcy Court cannot settle a claim with a value that will be affected by a future event -- here, the choice of a termination date for the UPI pension plan -- until that event comes to pass. Neither *TMT Trailer Ferry* nor any other case cited by Petitioners so holds. Moreover, the unprecedented duty that Petitioners seek to impose on Bankruptcy Courts would severely hamper their ability to conclude reorganizations and would lead to irrational and unwarranted delays. The Bankruptcy Court carefully examined the facts at hand and concluded that the PBGC Term Sheet was a reasonable and proper compromise. He was required to do no more and no less.

The total absence of merit in the Petition strongly suggests that it is aimed not at the bankruptcy court proceeding that it seeks to reverse, but at the Avacus Action, where Petitioners are defendants and potential defendants, and which cannot resume until all appeals of the Confirmation Order are resolved. The Petition should be denied.

A. The Alleged Procedural Defects Are Moot

1. Petitioners do not contest that any error by the Bankruptcy Court in connection with the Avacus Stipulation was harmless.

The Second Circuit and District Court affirmed the Bankruptcy Court's ruling with respect to the Avacus Stipulation on two independent grounds. In addition to finding that the Bankruptcy Court did not violate Rule 9019, both lower courts held that even if there was such a violation it was harmless error. Pet. at 3a; Jt. App. at 1238-44.

Avacus and Infotech spent nearly three years negotiating a compromise of Avacus's $25 million claim against Infotech's bankruptcy estate. The Avacus Stipulation resolved that claim against the estate. Moreover, as both the District Court and the Second Circuit noted, the Avacus Stipulation lifted the burden of all expenses relating to the Avacus Action from the shoulders of Infotech, yet at the same time guaranteed Infotech 50% of the recovery if Avacus prevailed. *Id.* The Avacus Stipulation was undoubtedly a "win-win situation" for Infotech. Jt. App. at 1243.

Under the circumstances, the Second Circuit and the District Court held not only that the Bankruptcy Court was correct in accepting the Avacus Stipulation as part of the Plan, but also that the Bankruptcy Court would have abused

its discretion had it failed to accept the agreement. Pet. at 3a; Jt. App. at 1243. For this reason, the lower courts concluded, any error resulting from the Bankruptcy Court's decision to "so-order" the Avacus Stipulation was harmless. *Id.*

Petitioners challenge neither the harmless error ruling nor the predicate finding that rejection of the Avacus Stipulation would have been an abuse of discretion. *See* Pet. at 10-14. The failure to challenge those rulings belies Petitioners' assertion that "the impact on these petitioners of the disregard of their right to prior notice of the approval of the [Avacus Stipulation] was substantial." Pet. at 13. In fact, the ruling that Petitioners seek would not affect the result below. Examination of an exercise of the Bankruptcy Court's statutory mandate to resolve claims against the estate that at worst amounted to harmless error is hardly a "special and important reason[]" to grant this Petition for Writ of Certiorari. *See* Sup. Ct. R. 10.1.

2. ***Petitioners cannot complain that the Bankruptcy Court was mistaken in accepting Infotech's judgment about the UPI pension plan termination date, since the subsequent choice of a termination date proved that Infotech was correct.***

Petitioners assert that by approving the PBGC Term Sheet as incorporated into the Reorganization Plan the Bankruptcy Court violated its duty to make an "informed, independent judgment" about the proposed compromise of PBGC's claim under *TMT Trailer Ferry*. *See TMT Trailer Ferry*, 390 U.S. at 424 (quoting *National Surety Co. v. Coriell*, 289 U.S. 426, 436 (1933)); Pet. at 14-17. Petitioners' sole rationale for this contention is that "[t]he failure of the PBGC to terminate the UPI pension plan as of

the date of the confirmation hearing made it impossible for the Bankruptcy Court to properly evaluate the PBGC's contention that Infotech was in UPI's 'controlled group.'" Pet. at 15.

All agree that under ERISA and applicable regulations, Infotech's liability for UPI's pension plan turned on whether it was in UPI's controlled group on the date of termination of the UPI pension plan. Pet. at 14-15; *see* 29 U.S.C. §§ 1362(a), 1301(a)(14); *see also* Treas. Reg. 1.414(c)-2(b)(2). Petitioners concede that the relevant "regulations provide that two companies are under common control if one has a direct or indirect ownership interest of 80 percent or more in the other." Pet. at 15. Since the UPI pension plan had not been terminated on the day the Reorganization Plan was to be confirmed, the unanswered question was whether Infotech would be within UPI's controlled group once the date of termination of the UPI pension plan was set.

As competing creditors of Infotech, Petitioners contend that PBGC received too much consideration in return for the compromise of its claim. *See* Pet. at 15-16; *see also* Brief for Appellants, *In Re Infotechnology, Inc.*, No. 95-5024 (2d Cir. June 9, 1995) ("App. Br.") at 26-40. Petitioners are deliberately opaque about how lack of knowledge of the UPI pension plan termination date affected the value of PBGC's claim. They assert cryptically that "different points in time have different implications for Infotech with regard to Infotech's alleged control of UPI," Pet. at 15, but they never spell out those implications. This calculated omission is necessitated by the subsequent choice of the plan termination date, a fact that also is conspicuously absent from Petitioners' briefing.

The UPI pension plan termination date, June 27, 1992, was chosen several months after the Reorganization Plan was confirmed. Jt. App. at 970-74. Petitioners do not

and cannot dispute that on June 27, 1994, Infotech controlled 99% of the voting stock of UPI, Pet. at 5a, more than enough to make Infotech and UPI part of the same "controlled group" under Petitioners' own reading of the law. Thus, whether or not the Bankruptcy Court correctly evaluated the merits of the compromise at the time the Reorganization Plan was confirmed, any doubts about the merit of PBGC's claim arising from uncertainty about the termination date were laid to rest when the date was chosen. Petitioners have nothing left to complain about and review by this Court under the circumstances is wholly unwarranted.

B. The Bankruptcy Court Did Not Err in Approving Infotech's Reorganization Plan

1. Petitioners were given more than adequate notice and opportunity to be heard under Bankruptcy Rule 9019 and the Due Process Clause.

Petitioners are wrong in asserting that this case will permit the Court "to address whether [Bankruptcy] Rule 9019 requires prior notice to interested parties of a settlement . . . that affects their property rights." Pet. at 11. In fact, Petitioners were given notice and two opportunities to object to the Avacus Stipulation before it took effect, the first of which they forwent. *See* Jt. App. at 595. As the Second Circuit held, the Avacus Stipulation was a "preliminary order" that "was expressly conditioned upon confirmation of the [Reorganization Plan] by final order of the Court." Pet. at 3a. Petitioners do not contest this factual finding. In light of the resulting concession that the Avacus's claim (and thus their "property interest," Pet. at 13) was not compromised until the Plan was confirmed after

adequate notice and a hearing, Petitioners cannot explain how the Bankruptcy Court violated Rule 9019 or their due process rights by "so-ordering" the Avacus Stipulation.[3]

Rather, Petitioners' briefing betrays that Rule 9019 and due process are merely cover for their true gripe with the Bankruptcy proceedings. They complain that "the Bankruptcy Judge himself [] participated in crafting" the Avacus Stipulation, while Petitioners were "totally excluded" from "the secret settlement process." Pet. at 12-13. But Rule 9019 and the Due Process Clause did not entitle Petitioners to participate in the settlement negotiations between Infotech and Avacus, nor did they prohibit the Bankruptcy Court from facilitating that process. There is no authority of any kind to support those propositions. On the contrary, "a bankruptcy judge must not be shackled with unnecessarily rigid rules when exercising the undoubtedly broad administrative power granted him under the [Bankruptcy] Code." *In Re Lionel Corp.*, 722 F.2d 1063, 1069 (2nd Cir. 1983).

Petitioners' due process arguments are coextensive with and indistinguishable from their arguments under Rule 9019. They do not contend that Rule 9019 provides less due process than required under the Due Process Clause. Either

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[3] The only case cited by Petitioners in support of their claim that they have a property interest under the Due Process Clause, *New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293 (1953), expressly notes that due process attach only to "judicial denial of a party's claimed rights." *Id.* at 297. There was no "judicial denial" of Petitioners' rights until the Plan was confirmed after notice and hearings.

the Bankruptcy Court violated Rule 9019 or it did not; there is no due process issue.[4]

2. *The Bankruptcy Court did not abuse its discretion in approving the PBGC Term Sheet.*

TMT Trailer Ferry requires a bankruptcy court to make an "informed, independent judgment" about whether a proposed compromise of a claim against the estate is "fair and equitable." *TMT Trailer Ferry*, 390 U.S. at 424. That is exactly what the Bankruptcy Court did before approving the PBGC Term Sheet as part of the Reorganization Plan. Contrary to Petitioners' suggestion, there was no "blind adherence to the Debtor's business judgment." Pet. at 16-17. The Bankruptcy Court examined the probability that the PBGC would succeed in its claim against Infotech, the difficulties in collecting a judgment and the complexity, expense and inconvenience of the potential litigation in light of "the paramount interest of creditors," before concluding that the PBGC Term Sheet was a reasonable settlement of PBGC's claims. Pet. at 41a-42a; *see also* Pet. at 33a-38a.

As the Second Circuit found, the Bankruptcy Court "played an active role in resolving the PBGC dispute with

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[4] Petitioners invoke the requirement of 11 U.S.C. § 1129(a)(3) that a Chapter 11 plan can only be confirmed if "the plan has been proposed in good faith and not by a means forbidden by law." Pet. at 11. The Petition, however, does not appear to allege bad faith. Since the Plan was "proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirements of section 1129(a)(3) [were] satisfied." *See In Re McCormick*, 49 F.3d 1524, 1526 (11th Cir. 1995).

Infotech and was completely familiar with the facts and circumstances of the PBGC settlement." Pet. at 5a. In particular, the following facts informed the Bankruptcy Court's decision: (a) at about the time UPI filed a Chapter 11 petition, Infotech controlled 99% of UPI's voting stock;[5] (b) Infotech had no legal role in choosing the UPI pension plan termination date; (c) PBGC asserted that it would choose a termination date for the UPI pension plan on which Infotech controlled more than 80% of UPI's voting stock; (d) Infotech believed that it would likely be found liable for the deficiencies in the UPI pension plan. *See* Pet. at 4a-5a. This was enough to make an informed, independent judgment.

Petitioners nevertheless assert, citing *TMT Trailer Ferry*, that it was beyond the Bankruptcy Court's discretion to approve the PBGC Term Sheet because the termination date for the UPI pension plan had not been chosen yet: "The failure of the PBGC to terminate the UPI pension plan as of the date of the confirmation hearing made it *impossible* for the Bankruptcy Court to properly evaluate the PBGC's contention that Infotech was in UPI's 'controlled group.'" Pet. at 14-17 (emphasis added). Petitioners therefore maintain that *TMT Trailer Ferry* prohibits a bankruptcy court from approving a settlement of any claim that is in some way contingent on the occurrence of a future event.

Petitioners have distorted *TMT Trailer Ferry* beyond recognition. In that case, the decision of the Bankruptcy

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[5] Petitioners hint that the amount of UPI voting stock controlled by Infotech "was the subject of dispute." Pet. at 16. Although they did challenge the import of control of 99% of UPI's voting stock below, *see* App. Br. at 31-37, they do not make that argument in this Petition. They have never challenged the fact that Infotech indeed controlled 99% of UPI's voting stock during the relevant time period.

Court was reversed because "there [was] no explanation of how the strengths and weaknesses of the debtor's cause[] of action were evaluated or upon what grounds it was concluded that [the settlement] . . . was 'fair and equitable.'" *TMT Trailer Ferry*, 390 U.S. at 434. Here, by contrast, the issue is whether, having examined all of the relevant facts at hand, the Bankruptcy Court may approve a settlement despite the existence of unfulfilled contingencies that might have an impact on the strength of the settled claim. *TMT Trailer Ferry* did not require the Bankruptcy Court to have at its disposal all "facts necessary to determine whether Infotech was responsible as a matter of law for UPI's pension obligations," as Petitioners aver. Pet. at 15. On the contrary, the Bankruptcy Court "was not required to decide the merits of every issue underlying" PBGC's claims, but only to "satisfy itself that the [s]ettlement was within the range of reasonableness." *In Re Best Products Co.*, 68 F.3d 26, 33 (2nd Cir. 1995); *see also* Pet. at 4a; *In Re Energy Cooperative, Inc.*, 886 F.2d 921, 929 (7th Cir. 1989).

Neither *TMT Trailer Ferry* nor any other case supports Petitioners' radical position that approval of the compromise of a claim is "impossible" if all facts necessary to resolve the claim as a matter of law have not yet come to pass or are not known to the parties. Such a rule would hopelessly deadlock bankruptcy proceedings. Worse, to impose a standard that required, in effect, judicial resolution of claims before settlements could be approved would frustrate the most important purpose of settlement, *i.e.*, to resolve claims without judicial intervention. Petitioners' proposed standards are unworkable, as is their Petition.

III. CONCLUSION

For the foregoing reasons, Respondent Avacus Partners, L.P. respectfully requests that the Petition for a Writ of Certiorari to the Second Circuit be denied.

Respectfully submitted.

ROBERT D. LUSKIN*
JOSEPH G. DAVIS
COMEY BOYD & LUSKIN
2828 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20007-3763
(202) 625-1200

Attorneys for Respondent
Avacus Partners, L.P.

* *Counsel of Record*